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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

2016 RIVERSIDE DRIVE, INC.,

Plaintiff and Appellant,

v.

MARCELO PIZARRO et al.,

Defendants and Respondents.

B214115

(Los Angeles County  
Super. Ct. No. BC377263)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
William F. Fahey, Judge. Affirmed.

Law Office of Kevin B. Jones, Kevin B. Jones, and Suki I. Patel for Plaintiff and  
Appellant.

No appearance for Defendants and Respondents.

In this breach of contract action, the jury returned a verdict for defendants Marcello Pizarro and Pizarro Design Studio. Plaintiff 2016 Riverside Drive, Inc. has appealed from the judgment based on claims of evidentiary error. We reject plaintiff's contentions and affirm.

## **BACKGROUND**

In keeping with plaintiff's contention that the alleged evidentiary errors were prejudicial per se, the opening brief does not attempt to summarize the evidence presented at trial or analyze the prejudicial effect of the omitted evidence. Given that we have no duty to search the record on the appellant's behalf (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738), we will similarly focus on the facts set forth in the opening brief. No response brief was filed on behalf of defendants.

Plaintiff hired defendants to design, build, and install executive office furnishings in plaintiff's offices. Of the \$53,000 total contract price, plaintiff paid defendants only \$47,500 and withheld the balance of \$5,500 for alleged product deficiencies. The parties attempted to resolve their disagreement but failed.

Plaintiff filed suit against defendants for breach of written contract, rescission, fraud (misrepresentation), and money had and received. At the conclusion of the evidence at trial, the trial court granted a directed verdict for defendants on the rescission and fraud causes of action. The remaining claims were submitted to the jury, which returned a defense verdict on the claims for breach of contract and money had and received. The trial court entered a judgment for defendants and this appeal followed.

On appeal, plaintiff does not challenge the directed verdict for defendants on the rescission and fraud causes of action. With regard to the jury defense verdict on the claims for breach of contract and money had and received, plaintiff seeks a reversal based on: (1) the exclusion of its expert witness on valuation, Ilan Dei; and (2) the partial exclusion of the testimony of a lay witness, Jeet Jogani, on the topic of valuation.

Plaintiff argues that the erroneous exclusion of evidence resulted in a denial of due process, which was prejudicial per se.

## **DISCUSSION**

We review the trial court’s evidentiary rulings for an abuse of discretion. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) “This standard is not met by merely arguing that a different ruling would have been better. Discretion is abused only when in its exercise, the trial court ‘exceeds the bounds of reason, all of the circumstances before it being considered.’ (*Denham v. Superior Court* [(1970)] 2 Cal.3d [557,] 566.) There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) A trial court will abuse its discretion by action that is arbitrary or “that transgresses the confines of the applicable principles of law.” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393; see *In re Cortez* (1971) 6 Cal.3d 78, 85.) In appeals challenging discretionary trial court rulings, it is the appellant’s burden to establish an abuse of discretion. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 331; *Denham v. Superior Court, supra*, 2 Cal.3d at p. 566.)” (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 281.)

### **I. Plaintiff Did Not Identify Dei as a Witness Before the Discovery Cut-Off Date**

Preliminarily, we note that this case is *not* governed by the expert witness disclosure provisions of chapter 18 of the Civil Discovery Act (Code Civ. Proc., § 2034.010 et seq. (chapter 18)),<sup>1</sup> because neither party had invoked its provisions.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure. Under chapter 18, any party may demand an exchange of expert witness information “no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.” (§ 2024.220.) The failure to identify an expert witness under chapter 18 may result in the exclusion of that witness at trial if certain conditions are met. (§ 2034.300.)

Plaintiff first identified Dei as a witness on September 4, 2008, less than 30 days before trial was set to begin on September 22, 2008. Accordingly, plaintiff did not identify Dei as a witness until *after* the discovery period had elapsed.<sup>2</sup>

On September 9, 2008, defendants filed a motion in limine to exclude all expert opinion testimony based on plaintiff's failure to identify any experts within the discovery period. Defendants argued that they had been led to believe at the August 15, 2008 deposition of plaintiff's "PMK" (person most knowledgeable), Anil Mehta, that plaintiff had not hired anyone to repair the allegedly defective furniture or to provide repair estimates.

At the September 22, 2008 motion in limine hearing, the trial court ordered plaintiff to make Dei available for a deposition before the close of business (determined by the court to be 5:00 p.m.) that day. According to the opening brief, the deposition did not take place because Dei, who was not available before 5:00 p.m., was available at 8:00 p.m., but the trial court did not change its order.

Plaintiff contends that the exclusion of Dei as a witness was "unjustified and not supported by any legal authority." We disagree. Even though this case is not governed by chapter 18, other statutory time limits apply. Under section 2024.020, "any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (§ 2024.020.) In this case, rather than impose an outright ban on Dei's testimony, the trial court conditioned his testimony on the taking of his deposition before 5:00 p.m. that day, thereby reopening discovery. "Discovery can be reopened on motion by any party for good reasons when it is necessary, the party seeking further discovery has been diligent, and there will be neither prejudice to the opponent nor impact on the scheduled trial date. (§ 2024.050.)" (*McCoy*

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<sup>2</sup> The discovery cut-off statute provides in relevant part: "Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (§ 2024.020, subd. (a).)

*v. Gustafson* (2009) 180 Cal.App.4th 56, 97, fn. omitted.) When Dei's deposition did not occur before 5:00 p.m. on the date set for trial, it was reasonable for the court to preclude Dei from offering opinions at trial that had not been disclosed in any manner. Given that the initial trial date had passed, it was also reasonable for the trial court to refuse to reschedule Dei's deposition, which would further delay the trial. We therefore conclude that plaintiff has failed to show that the exclusion of Dei's testimony was an abuse of discretion.

In any event, plaintiff's claim must fail for the additional reason that the opening brief does not mention whether an offer of proof was made regarding Dei's excluded testimony. Where an appellant contends that evidence was wrongfully excluded at trial, "the failure to make an adequate offer of proof in the court below ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence. (Evid. Code, § 354; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 344; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.)" (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 282.)

## **II. Plaintiff Failed to Provide an Offer of Proof Regarding Jogani's Lay Opinion Testimony on Value**

Plaintiff contends that the trial court erroneously excluded Jogani's lay opinion testimony on the value of the allegedly damaged or defective furnishings.

Although the opening brief cites Evidence Code sections 800, 802, 805, 811, 813, and 814, it does not explain why Jogani's lay testimony on value was admissible under those sections. It provides no explanation of Jogani's relationship with plaintiff, his role in the disputed contract, or what his excluded testimony would have shown. Given the failure to make an adequate offer of proof in the trial court, we decline to consider the issue.<sup>3</sup> (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 282.)

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<sup>3</sup> As plaintiff has failed to establish an abuse of discretion as to either witness, we need not discuss whether the exclusion of their testimony was prejudicial per se.

## **DISPOSITION**

The judgment is affirmed. Each party shall bear its own costs.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.